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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF ARIZONA,
PETITIONER,

-vs-

EDWARD PALENKAS,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Due Process Clause of the United States Constitution precludes the State from introducing evidence of a person's pre-arrest, pre-*Miranda* refusal to consent to a search of his car, during the preliminary investigation of the case?

2. Whether the Due Process Clause of the United States Constitution precludes the State from introducing evidence that a person contacted an attorney prior to arrest, advisement of *Miranda* rights, or the filing of charges?

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OPINION BELOW

The opinion of the Arizona Court of Appeals, reversing Respondent's convictions is reported at 229 Ariz. Adv. Rep. 18 (Az. Ct. App. Nov. 5, 1997), and is published in the Appendix at A. The Arizona Supreme Court denied Petitioner's petition for review of the Arizona Court of Appeals' opinion, however, one justice would have granted the petition. The order of the Arizona Supreme Court is included in the Appendix at B. The mandate from the Arizona Court of Appeals, remanding the case to the trial court is included in the Appendix at C.

STATEMENT OF JURISDICTION

Petitioner respectfully request that a writ of certiorari issue to review the decision of the Arizona Court of Appeals. (Appendix A) The Arizona Court of Appeals issued its decision on November 5, 1996. On March 27, 1997, the Arizona Supreme Court denied Petitioner's petition for review. Petitioner's timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of the law . . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On April 12, 1994, Palenkas and a friend, Robert Davis, had drinks and dinner at a restaurant in North Scottsdale, Arizona. Three employees saw Palenkas leave the restaurant intoxicated. The bartender, who had served Palenkas and determined that he was intoxicated, offered to give him a ride home and asked him twice for his car keys. Davis also asked Palenkas if he was alright and asked him for his car keys. Palenkas, however, decided to drive himself home, with Davis following him.

In the meantime, Ted Turner and his 11-year-old son, Kipp, were walking along the roadside of the same road Palenkas was traveling, facing oncoming traffic. Palenkas was driving erratically and weaving. Ted saw Palenkas' vehicle weave onto the dirt shoulder and then return to the road. Palenkas' vehicle erratically changed its direction as it missed striking Ted. Instead, Kipp, who was walking behind his father and who was visible from 300 to 400 feet, was struck by Palenkas' Rolls Royce. The force of impact catapulted Kipp's body toward the windshield. Kipp's head struck Palenkas' vehicle below the windshield, causing rapid bleeding and a gaping skull fracture. Kipp died instantly. Palenkas left the scene and later claimed that he was "not really paying too much attention," and that he thought that he struck a barricade.

When Palenkas arrived home he told his daughter that he hit a "yield" sign and told his house guest, Harold Dunn, that he had hit a construction barrier. Later that night, Palenkas called Davis, asking him if he saw the front end of his Rolls Royce and discussed the collision.

Early the next morning, after hearing news of the accident, Palenkas called Davis and admitted to Davis, "[I]t could have been me that hit the boy." Also that morning, Dunn noticed that the reddish substance he had seen on the damaged fender of Palenkas' vehicle the night before was gone.

The cream colored paint chips and lens fragments gathered from the crime scene were determined by police to be consistent with a 1984 or newer Rolls Royce or Bentley. The evening following the fatality, detectives obtained a list of registered owners of cars matching this description, and began contacting owners at their homes to request permission to view their vehicles. The fourth person the detectives contacted was Palenkas, who was standing outside his home. The detectives explained that they were looking for a Rolls Royce or Bentley involved in the death of an 11-year-old boy. Palenkas responded to questions by telling the detectives that he owned a white Rolls Royce. Palenkas, however, did not respond to their initial request to look at his vehicle. Palenkas invited the detectives inside his home. When they again asked Palenkas if they

could look at his car, he walked through his house, leading them to his den. The detectives again asked if they could look at his car, to which Palenkas responded, "no," "I don't think I can do that."

The detectives left and waited outside Palenkas' house for a search warrant. The detectives noticed that Palenkas' garage light was being turned on and off. The detectives obtained a search warrant, which was executed the following day. The damage to the front end, hood, and fender of Palenkas' vehicle was consistent with Kipp's injuries. Subsequent analysis of Palenkas' vehicle indicated that Kipp's blood had been wiped off the fender and outside mirror, as evidenced by chemical analysis, swipe marks, and a white paper towel fleck found underneath a paint shred. A piece of Kipp's tissue and blood were found adhered to the underside of the outside mirror.

At trial, evidence was admitted that Palenkas had refused to consent to a search of his vehicle. Evidence was also admitted that Palenkas had contacted his attorney, both *before* and after the police had contacted him. According to Palenkas, he contacted his attorney because he was concerned that he might have been a witness to the fatality and was concerned about his obligations. In closing argument, the prosecutor argued, that on the facts of this case, Palenkas' refusal to consent to a search of his vehicle

and the fact that he contacted counsel, as opposed to the police, immediately after the fatality were indicative of his consciousness of guilt.

A jury convicted Palenkas of reckless manslaughter, and leaving the scene of a fatal injury accident. Palenkas was sentenced to 10½ years for the manslaughter conviction and 1½ years for the leaving the scene of a fatal accident conviction, to run concurrently.

The Arizona Court of Appeals reversed Palenkas' convictions, finding that the prosecution's references to Palenkas' prearrest, pre-*Miranda* refusal to consent to a search and his contact with an attorney prior to his arrest violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals held as follows:

> Although the [United States] Supreme Court has not addressed whether due process is violated by admission of evidence of either a defendant's invocation of his fourth amendment right to refuse a warrantless search or his decision to meet with counsel before his arrest, many other jurisdictions have addressed those issues, and have found a due process violation occurs under circumstances similar to those in this case. . . .
>
> We conclude that the prosecution's references to defendant's invocation of his fourth amendment rights to refuse to consent to a warrantless entry and to his contact with an attorney prior to his arrest violated defendant's due process rights to a fair trial.

(Appendix at A-21–27.) The opinion of the court of appeals also held that the constitutional errors were not harmless beyond a reasonable doubt. (*Id.* at A-31–32.) The Arizona Supreme Court subsequently denied Petitioner's

petition for review from the opinion, with one justice dissenting. (Appendix B-1.)

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari because the court of appeals has decided two important questions of federal constitutional law that this Court has never expressly addressed and relies on opinions from other jurisdictions that have consistently misapplied this Court's opinion in *Doyle v. Ohio,* 426 U.S. 610 (1976). This Court should grant the petition for writ of certiorari to correct this misapplication of *Doyle* by federal and state courts.

1. The Arizona Court of Appeals has erred as a matter of federal constitutional law by creating two significant new constitutional due process principles, that directly contradict this Court's reasoning in *Doyle,* and its progeny.

The court of appeals opinion held that the use of a defendant's prearrest, pre-*Miranda* refusal to consent to a search and contact with counsel violated his federal due process rights. The opinion of the court of appeals is premised on a misapplication of *Doyle*.

a. The federal due process protections announced in *Doyle* do not apply to a defendant's prearrest, pre-*Miranda* refusal to consent to a search.

The court of appeals held that evidence of a defendant's prearrest, pre-*Miranda* refusal to consent to a search, during the preliminary investigation, was inadmissible based upon the reasoning in *Doyle*. (Appendix at A-21–25). The court of appeals relied on *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978) (3:2 decision), interpreting *Doyle* to support its holding that:

> We see no valid distinction between the privilege against self-incrimination and the right to be free from warrantless searches, when invoked. . . . [because] [i]n either situation, we believe that a defendant's invocation of constitutional rights is probative of nothing more except the defendant's awareness of his her constitutional rights.

(Appendix at A-25–26.)

The court of appeals incorrectly premised its holding on this Court's opinion in *Doyle*, and cases from other jurisdictions, to support its holding that evidence of a defendant's pre-arrest, pre-*Miranda* refusal to consent to a search is analogous to commenting on a defendant's *Miranda*-induced silence. *E.g., United States v. Thame*, 846 F.2d 200, 205–07 (3rd. Cir.), *cert. denied*, 488 U.S. 928 (1988); *United States v. Prescott*, 581 F.2d 1343, 1352–53 (9th Cir. 1978); *United States v. Taxe*, 540 F.2d 961, 969

(9th Cir. 1976), *vacated in part on other grounds*, 540 F.2d 961, *cert. denied*, 429 U.S. 1040 (1997); *United States v. Rapanos*, 895 F. Supp. 165, 168–69 (E.D. Mich. 1995); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979).

The opinion of the court of appeals is flawed for two reasons. First, the opinion is contrary to *Doyle* and to this Court's opinions spanning 21 years that have interpreted *Doyle*. *Doyle* announced that due process protects a defendant from the state's use of his *Miranda*-induced silence against him at his criminal trial. *Doyle*, 426 U.S. at 617. Pivotal to the Court's ruling was the fact that *Miranda* warnings are required prior to custodial interrogation as a means of safeguarding Fifth Amendment rights:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is *insolubly ambiguous because of what the State is required to advise the person arrested*. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 618–19 (emphasis added, citations omitted). This Court has subsequently limited the due process protections announced in *Doyle* to *Miranda*-induced silence and has adamantly refused to extend these protections to an individual's pre-*Miranda* and pre-arrest conduct, which

is at issue in this case. *Greer v. Miller,* 483 U.S. 756, 764–65 (1987) (reaffirming that *Doyle* rests on premise that absent assurances embodied in *Miranda* warnings, the Constitution does not prohibit use of post-arrest silence for impeachment); *South Dakota v. Neville*, 459 U.S. 553, 565–67 (1983) (due process protections of *Doyle* do not preclude evidence of a defendant's post-arrest refusal to take blood-alcohol test); *Fletcher v. Weir,* 455 U.S. 603, 606–07 (1982) (due process protections of *Doyle* do not apply to a defendant's post-arrest silence); *Anderson v. Charles,* 447 U.S. 404, 407–08 (1980) (impeachment with post-*Miranda* statements admissible); *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (impeachment with pre-arrest silence does not violate due process): *Roberts v. United States*, 445 U.S. 552, 561 (1980) (post-conviction, pre-sentencing silence admissible). Most recently, this Court held firmly to its interpretation that *Doyle* and its progeny apply *only* to *Miranda*-induced silence:

> The 'implicit assurance' upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda*. Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest . . . . or after arrest if no *Miranda* warnings are given. . . . *Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.*

Brecht v. Abrahamson, 507 U.S. 619, 629 (1993) (citations omitted, emphasis added). *Brecht* recognized that a defendant's pre-arrest conduct,

is probative because, unlike *Miranda*-induced silence, it is not induced by any implicit promises on the part of law enforcement. *Id.*

Likewise, other state and federal courts have limited the due process protections of *Doyle* to *Miranda*-induced silence, and have held that the admissibility of evidence outside this realm is determined by evidentiary rules. *See e.g., United States v. Harris,* 726 F.2d 558, 560 (9th Cir. 1984); *United States v. Greene,* 698 F.2d 1364, 1374 (9th Cir. 1983); *People v. Dixon,* 552 N.W.2d 663, 668 (Mich. App. 1996); *People v. Alexander,* 469 N.W.2d 10, 14 (Mich. App. 1991).

The distinction made in *Brecht* is particularly applicable in the present case because it reveals that the opinion of the court of appeals applied the due process protections of *Doyle* beyond what was intended by this Court. *Brecht*, 507 U.S. at 629. The ambiguity that *Doyle* feared and sought to protect does not exist when a defendant is asked to consent to a search because the defendant is not entitled to be advised that he has the right to refuse. Palenkas' refusal to consent, was not preceded by any type of *Miranda*-like warnings that contained "such misleading implicit assurances as to the relative consequences of his choice." *Neville,* 459 U.S. at 566. Unlike the defendant in *Doyle*, Palenkas' refusal was not induced by implicit assurances from the police that he had the right to refuse and that

his refusal could not be used against him in a later prosecution. *See, United States v. McNutt*, 931 F.2d 251, 257 (4th Cir. 1991) (holding *Doyle* analysis inapplicable in determining admissibility of defendant's refusal to consent, finding that the defendant's refusal was admissible to impeach claim that the police officer planted evidence), *cert. denied*, 502 U.S. 1035 (1992).

Moreover, this Court has specifically refused to extend similar *Miranda*-like requirements to law enforcement prior to seeking consent to a search of a home or property. *Schneckloth v. Bustamonte*, 412 U.S. 218, 241–48 (1973) (knowledge of right to refuse not an essential part of proving effective consent to a search). Recently, this Court again refused to extend *Miranda*-like protections to lawfully seized detainees. *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996) (the Fourth Amendment does not require that a lawfully seized individual be advised that he is "free to go" before his consent to search will be recognized as voluntary). Thus, the fundamental unfairness that *Doyle* sought to protect does not exist in this case because the detectives made no promises to Palenkas that his refusal would not be used against him.

Second, using a defendant's refusal to consent to a search has no appreciable impairment of Fourth Amendment policies. As this Court has

recognized, "[t]here is a vast distinction between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment." *Bustamonte,* 412 U.S. at 241. This Court has announced that the Fourth Amendment should be interpreted to encourage individuals to consent to a search:

> [I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

Id. at 244 (citations and quotations omitted).

In the present case, when the detectives contacted Palenkas, he was merely the fourth name on a motor vehicle list and his interaction with the police was completely consensual. Palenkas defended at trial on the theory that he was concerned about his legal obligations because he thought he was a witness to the fatality. Palenkas also denied that there was blood on his vehicle or that he attempted to destroy this evidence. The search, however, yielded tangible evidence that provided a basis for his prosecution. Thus, evidence that he refused to let the detectives look at his car is probative of more than what the opinion of the court of appeals described as being "probative of nothing except the defendant's awareness of his or her constitutional rights." *Bustamonte,* 412 U.S. at 229.

Therefore, unlike *Doyle*, Palenkas did not receive "the sort of implicit promise to forgo use of evidence that would unfairly 'trick' [him] if the evidence were later offered against him at trial." 459 U.S. at 566.

b. The due process protections announced in *Doyle* do not preclude evidence that a defendant contacted counsel immediately after the crime.

The court of appeals similarly held that evidence that Palenkas contacted an attorney immediately after the offenses, but prior to his arrest, violated federal due process because "[s]uch statements strike at the core of the right to counsel, and must not be permitted." (Appendix at A-26.) (citing *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990); *United States v. Yeager*, 476 F.2d 613, 616-17 (3rd Cir. 1973)). The cases from other jurisdictions relied on by the court of appeals are also premised on the belief that introducing evidence of a defendant's consultation with counsel prior to his arrest, advisement of his *Miranda* rights, or charging, violates "the right to counsel." *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990); *United States v. McDonald*, 620 F.2d 559, 563-64 (5th Cir. 1980); *United States v. Yeager*, 476 F.2d 613, 616 (3rd Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

In addition to the above arguments, the court of appeals' analysis is flawed because it is premised on the incorrect assumption that a defendant

has a federal constitutional right to counsel during the investigation of a crime. *See Neville,* 459 U.S. at 566 (rejecting argument that evidence of the defendant's post-arrest refusal to submit to a blood-alcohol test violated due process under *Doyle* because the right to refuse the test was not constitutionally protected conduct). A defendant's Fifth Amendment right to counsel is triggered by the advice of *Miranda* warnings, *Miranda v. Arizona,* 384 U.S. 436, 475–76 (1966), and the Sixth Amendment right to counsel attaches when formal criminal judicial proceedings are initiated. *Massiah v. United States*, 377 U.S. 201, 204–06 (1964). Consequently, evidence concerning Palenkas' pre-arrest contact with counsel did not improperly comment upon the exercise of a constitutional right. This evidence is on equal footing with any other type of evidence and, therefore, its admissibility is governed by the state rules of evidence. *Jenkins*, 447 U.S. at 241 (admissibility of a defendant's pre-arrest silence is governed by rules of evidence); *State v. Stanley,* 809 P.2d 944, 947–49 (Az.) (capital defendant's pre-arrest requests for counsel, during interview at the police station, admissible as long as they are voluntary), *cert. denied,* 502 U.S. 1014 (1991).

Likewise, this Court has extended a similar analysis to the introduction of non-testimonial evidence from a defendant. These cases

recognize that a defendant does not have a Fifth Amendment right to refuse to submit to a physical examination, thus, admission of the results and evidence of a defendant's refusal do not infringe on any constitutional right, including federal due process. *Neville,* 459 U.S. at 565–67 (1983) (refusal to take a blood-alcohol test); *Cupp v. Murphy,* 412 U.S. 291 (1973) (fingernail scrapings); *United States v. Dionision,* 410 U.S. 1 (1973) (voice exemplars); *Gilbert v. California,* 388 U.S. 263 (1967) (handwriting exemplars); *United States v. Wade,* 388 U.S. 218 (1967); *see also, Schmerber v. California,* 384 U.S. 757 (1966) (evidence of blood-test results, taken over objection of the defendant, admissible). The opinion of the court of appeals contradicts this Court's reasoning in these cases because Palenkas' contact with counsel was not constitutionally protected conduct and, therefore, was not entitled to federal due process protection.

In conclusion, federal due process does not preclude evidence of a defendant's pre-arrest refusal to consent to a search and contact with counsel in a criminal trial. Rather, the admissibility of this evidence should be limited only to the state rules of evidence.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari and reverse the opinion of the Arizona Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	1 CA CR 95-0752
Appellee,	)	
	)	Department D
vs.	)	
	)	
EDWARD PALENKAS	)	
	)	OPINION
Appellant.	)	Filed November 5, 1996
	)	

Appeal from the Superior Court of Maricopa County
Cause No. CR 94-91187
The Honorable Christopher M. Skelly, Judge

REVERSED AND REMANDED

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V O S S, Judge

Edward Palenkas ("defendant") appeals from his convictions, after a jury trial, of one count of reckless manslaughter and one count of leaving the scene of a fatal injury accident. The only issue we address in this opinion[1] is whether the prosecutor's use of defendant's invocation of his constitutional right to refuse a warrantless search and the fact that he contacted his attorney, as evidence of guilt, deprived him of due process and requires a new trial. Because we find that the prosecutor's conduct, not invited by defendant, resulted in prejudicial, fundamental unfairness that violated defendant's right to due process, we reverse and remand for new trial.

FACTS AND PROCEDURAL HISTORY

We view the facts in the light most favorable to sustaining the jury's verdicts. *See State v. Atwood*, 171 Ariz. 576, 596, 832 P.2d 593, 613 (1992), *cert. denied*, 506 U.S. 1084 (1993).

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1. By separate unpublished decision filed this date, we address the remaining issues raised by defendant on appeal, because they are likely to arise again upon retrial. Those issues are not relevant to our analysis in this opinion. *See Fenn v. Fenn*, 174 Ariz. 84, 85, 847 P.2d 129, 130 (App. 1993).

A. The Hit-and-Run

The charges against defendant arise from a fatal hit-and-run accident in Scottsdale on the evening of April 12, 1994. At approximately 7:40 p.m., the victim, an 11 year-old-boy, and his father were walking along the roadside of Frank Lloyd Wright Boulevard, facing oncoming traffic. The road had no sidewalk in this area. While walking along the roadside, the victim and his father approached some dirt mounds created by the recent digging of a trench for gas pipelines. The trench extended across the road, where it was covered by metal plates. The metal plates ended at the shoulder of the road, however, leaving the trench exposed. Thus, to cross the trench, pedestrians had to walk around the piles of dirt into the roadway. The victim and his father walked around the mounds in the direction of the street and then returned to the shoulder of the road. As the two continued walking, the father noticed an approaching car "weaving" and "driving very close on the inside of the road." The car left the road and briefly traveled along the dirt shoulder. The victim's father testified at trial that the car "erratically changed its direction" as it passed him and that it then struck the victim. The force of the impact threw the victim's body approximately 65 to 70 feet back onto one of the mounds of dirt. The victim's father observed the car, which was followed by another car,

continue to a nearby intersection. The car stopped at the intersection and then drove on. The victim died at the scene.

B. The Investigation

Relying on the father's description of the vehicle as "a dark-colored, full-size vehicle, possibly four-door, with tinted windows," the Scottsdale Police Department initially issued an attempt to locate a vehicle matching that description and having damage to the right front portion of the car. However, paint chips removed from the victim's body and clothing, and amber lens fragments collected from the accident scene, soon led the police to believe that the vehicle that struck the victim was in fact a 1984 or newer cream-colored Rolls Royce or Bentley. After obtaining a list of registered owners of cars matching this description from the Department of Motor Vehicles, the police began contacting owners at their homes to request permission to view their vehicles.

In pursuing this investigation, Scottsdale police detectives Tom Vanmeter and Don Bellendier contacted defendant at his home on the evening of April 13, slightly more than 24 hours after the incident occurred. Defendant owned a 1986 magnolia-colored Rolls Royce Silver Spur. The detectives informed defendant that they were investigating a collision involving the death of an 11-year-old boy and asked to see his Rolls Royce. Defendant responded, "I don't think that I can do that." At

trial, defendant explained that he had refused consent because he was waiting for a return phone call from his lawyer about how to proceed.

The detectives subsequently obtained a warrant to search defendant's residence, and the warrant was executed the next day. The right front portion of defendant's car revealed damage consistent with striking the victim.

C. Defendant's Version of the Events

The evidence introduced at trial revealed that, on the evening of the accident, defendant dined with his close friend, Robert Davis, at the Reata Pass Steakhouse in Scottsdale, a restaurant that the two men frequented. Defendant and Davis arrived at the restaurant in separate cars. Defendant testified that he consumed two mixed drinks while at the restaurant, and that he consumed no other alcohol that evening. Testimony from employees at the restaurant, however, indicated that defendant's speech was slurred and slower than usual, that his face was flushed, and that his coordination was somewhat impaired. The evidence also revealed that defendant slipped or stumbled on a ramp when leaving the restaurant, and out of concern that defendant might have been "buzzed," the restaurant's bartender, who knew defendant well, twice asked whether defendant wanted to give him his keys so that he could drive him home. Defendant indicated that he was fine, but then told Davis to follow him home.

While driving home from the restaurant, defendant struck and killed the victim. Although defendant observed the obvious damage to his car when he arrived home that evening, he testified that he believed the damage was caused by striking some construction equipment or by hitting an object possibly thrown through the air after being struck by a "dark vehicle" traveling in front of defendant's Rolls Royce. Defendant telephoned Bob Davis later that night, informed him about the damage to his vehicle, and asked whether Davis had seen him hit a barricade. Davis indicated that he had not seen defendant's car hit anything.

Defendant telephoned Davis again the next morning to tell him that he had seen a news report on television about the hit-and-run accident on Frank Lloyd Wright Boulevard. Davis testified that defendant commented, "We came through there approximately the same time, and . . . it could have been me that hit the boy."

D. Procedural History

A Maricopa County Grand Jury indicated defendant on April 21, 1994, charging him with one count of manslaughter and one count of leaving the scene of a fatal accident. At trial, defendant did not contest the state's evidence linking his vehicle to the hit-and-run. Rather, his defense was that the victim's death was a tragic accident which he could neither have foreseen nor avoided.

The jury convicted defendant on both counts of the indictment. The trial court sentenced defendant to presumptive terms of ten and one-half years for the manslaughter conviction and one and one-half years for leaving the scene of a fatal accident, to run concurrently. Defendant timely appealed.

DISCUSSION

I. DEFENDANT'S INVOCATION OF HIS CONSTITUTIONAL RIGHTS INTRODUCED AS EVIDENCE OF GUILT AT TRIAL

A. Defendant's Motion in Limine

Several months before trial, defendant filed a motion *in limine* requesting that the court preclude the state from "introducing evidence through any means that comments on or infers the defendant's consultation with counsel, and his refusal to grant consent to a search and seizure of evidence at his residence."[2] The state did not object to the motion *in*

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2. The Arizona Supreme Court has held that, in the criminal context, a motion *in limine* "is nothing more than a motion to suppress specifically authorized by Rule 16, Arizona Rules of Criminal Procedure." *State v. Rodriguez*, 126 Ariz. 28, 30, 612 P.2d 484, 486 (1980).

limine, and informed the court, "Obviously, we've conceded those issues."[3] The court then granted defendant's motion, ruling as follows:

> It's ordered granting the motion in limine regarding comments on invocation of rights, right to counsel, and the similar motion to suppress evidence. . . .

B. Testimony in Violation of the Motion in Limine

At trial, the state called Thomas Vanmeter and Don Bellendier, the Scottsdale Police Department detectives who contacted defendant at his residence the night after the incident. The prosecutor first questioned Detective Vanmeter:

> Q: [D]id you ask the Defendant if you could look at his car?
>
> A: Detective Bellendier did.
>
> Q: And what was the Defendant's response to that?
>
> A: I don't have it. I have not read Detective Bellendier's report. *But it was basically, "No."*

(Emphasis added.) The prosector then questioned Detective Bellendier on the same issue:

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3. The state argues on appeal that its "concession" was limited to preclusion of references to defendant's contact with his attorney. Although that is the only issue conceded in the state's written response to defendant's motion *in limine*, the state did not otherwise object to the preclusion of references to defendant's refusal to consent to a warrantless search of his car, and the prosecutor clearly conceded "those issues" in open court when asked if she had any objection to the motion. We therefore reject the state's position that the court's *in limine* ruling was limited to evidence of defendant's contact with his attorney.

Q: Did you tell the Defendant that you wanted to look at his car at some point?

A: While we were standing out front, we stated that we would like to look at it. Then, when we walked inside, we again stated that.

Q: And did you then follow the Defendant somewhere after that?

A: He had asked us to come into the house.

. . . .

Q: Did he tell you, prior to you following him into the den, that he was going to allow you to look at the car?

A: No.

. . . .

Q: And when you went into the den, you indicated that - - you asked the Defendant again if you could look at his car. Is that right?

A: Yes.

Q: And what did he say to you at that time?

A: *He stated that he didn't think he could do that.*

Q: Did you ask the Defendant, immediately after that, any questions?

A: Yes.

Q: What did you ask him?

[DEFENSE COUNSEL:] Objection. May we approach, Your Honor?

(Emphasis added.) At that point, an off-the-record bench conference ensured,[4] after which the prosecutor did not return to this line of questioning.

Defendant later provided the following testimony on direct examination concerning his contact with this attorney:

Q: Did you ever call the police to check and find out about the dark car?

A: No, I did not.

Q: Did you think about that?

A: I thought of it, yes.

Q: What did you do?

A: Well, later in the afternoon I called Steve.

Q: Who is Steve?

A: My attorney and friend.

Q: What kind of attorney?

A: Family attorney. Steve Jackson.

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4. Our courts have previously disapproved the practice of holding unrecorded bench conferences on trial motions. *See State v. Fletcher*, 149 Ariz. 187, 189, 717 P.2d 866, 868 (1986). In this case, however, we cannot fault defense counsel for the lack of a contemporaneous record because the trial court precluded speaking objections, and indicated that, "because the courtrooms are so small, and we're so close to the jury, unfortunately we can't make a simultaneous record, what's stated at the bench conference. So what I do is make a ruling there, tell you guys about it, if anyone wants to make a record on it later, we go back and do that."

Q: Why would you call Steve?

A: Well, to ask him if I was supposed to handle this a certain way. I thought maybe I'd be a witness to the accident.

Q: So, in your mind you were thinking maybe you should do something?

A: Maybe I should do something, yes.

Q: Now, is Steve the kind of person that you sort of use as a lawyer and advisor?

A: Lawyer and advisor, yes, friend.

Defense counsel then questioned defendant about his conversation with Scottsdale's police detectives at his home.

Q: Did you let them into the house?

A: Yes, I let them in.

Q: What did they ask you [if] they could do?

A: They asked if I owned a Rolls.

Q: And did you answer them?

A: I answered them that I did.

Q: And what did they want to do?

A: They wanted to see it.

Q: And what did you tell them?

A: *I told them to wait a minute -- that I haven't heard back from Steve yet -- until I call him.*

(Emphasis added.)

In response to defendant's testimony concerning his attempt to contact his attorney, the prosecutor sought to introduce handwritten notes, previously held inadmissible by the court, which had been seized from defendant's residence and suggested that defendant contacted an attorney the day after the incident because he was concerned about his own involvement in the victim's death, rather than because of questions about his obligations as a possible witness to the accident. The trial court denied the prosecutor's request to introduce the evidence, but concluded that whether defendant "consulted with counsel, and when and with whom, has become relevant because the defense has made it so." The court indicated, however, that it would continue to entertain this objection on "a question basis."

On c oss-examination, the prosecutor further questioned defendant regarding his contact with an attorney:

Q: [Y]ou didn't call the police and report what you knew about the dark car, did you?

A: I did not.

Q: As a matter of fact, you called your attorney; is that right?

A: That was later in the afternoon.

Q: And you got -- strike that. You actually at some point in time, got information with respect to another attorney that you could get advice from; isn't that right, sir?

[DEFENSE COUNSEL]: Objection. May we approach, Your Honor?

THE COURT: Sure. Come up.

(Whereupon, a discussion at the bench took place.)

THE COURT: Sorry for the delay. I think we've got it worked out.

Q: And did you talk with your lawyer that day, sir?

A: Excuse me?

Q: Did you talk with your lawyer that day?

A: Yes, I did.

Q: And that was Mr. Jackson?

A: Yes.

Q: And after you spoke with your lawyer, you still didn't go to the police and report this information about this dark car; is that right?

A: No, I didn't.

Q: Did you speak with any other lawyers that day, sir?

A: Not until much later, until after the police came.

Q: Prior to the time the police arrived, did you speak with any other lawyers besides Mr. Jackson?

A: No, I did not.

The prosecutor then questioned defendant regarding his response to the police detectives' request to see his Rolls Royce:

Q: And after they asked you if they could look at your car, you said, "No, I don't think I can let you do that," is that correct, sir?

A: *I told them I wanted to call my attorney first.* He was supposed to get back with me, and he never did.

Q: Sir, wasn't the evidence that you heard at trial from the police officers that they asked you if they could look at your Rolls-Royce, not once but twice, and you said to them, "No, I don't think I can let you do that." Isn't that right, sir?

A: *I might have told them I can't let them look at it until I talk to my attorney.*

Q. So you, basically -- at that point in time, *you basically refused to let the police look at your car, correct*?

A: *Until I talked to my lawyer.*

(Emphasis added.) Defense counsel again objected and a bench conference ensued, after which the trial court sustained defense counsel's objection "on the basis that [the question has] been asked and answered." Later that day, defense counsel made a record indicating that he had moved for a mistrial during the bench conference because the prosecutor's questioning of defendant had an "impact upon [defendant's] assertion of his Constitutional Rights." The trial court again denied defendant's motion for mistrial.

C. Prosecutorial Comments

During closing argument, the prosecutor returned to the issues of defendant's contact with an attorney and his refusal to consent to a search:

> [The detectives] asked to look at the defendant's Rolls-Royce. He didn't ask them why. He simply turned around, he walked into the house, they followed him in there, followed him into his study. *They ask him again when they got into the study, "I'd like to look at your car." And the defendant, at that point, said to them, "I don't think I can do that."*
>
> * * * *
>
> [Defendant] [d]idn't call the police then and report [that he had seen a dark car at the scene], *he called his lawyer. And you know why, because he knew he was the one who hit that boy*. He knew he was involved in the death of [the victim]. He knew that there wasn't any dark car. He was concerned, at that point, about one thing, protecting himself. *He was concerned about not being arrested by the police. And that's why he called his lawyer*. And that's why he didn't call the police at that time.
>
> * * * *
>
> And when the police asked to look at his car, *instead of saying, "Well, of course, Officer, of course you can look at my car. I don't have anything to hide." what did he say? He said, "I don't think I can let you do that."*
>
> * * * *
>
> Now, why is it that someone, a reasonable person, would behave the way the defendant behaved that evening. You know, . . . this is the defense, the defense raised this. Someone who has a defense would put [it], *it is a good person who simply had a bad thing happen to them*. . . . A reasonable person, a responsible person, a good person wouldn't do that, *a person who had nothing to hide wouldn't do those things*.

> And that's the big problem with the defense in this case. *The defendant's later actions are simply inconsistent with the defense*. The defendant did not act reasonably. And that's because he had something to hide. . . .
>
> Now, the defense -- *I think that their theme was that [bad] things happen to [good] people*. And, again, all of that is inconsistent, inconsistent with the facts you've heard in this case. *Because a good person would have acted differently from the way the defendant behaved*. . . .
>
> * * * *
>
> *Good people help the police in pursuing an investigation of this type. They don't frustrate the police by requiring them to get a search warrant to find evidence of a crime. Good people take responsibility for their actions*.

(Emphasis added.)

II. THE DUE PROCESS VIOLATION

On appeal, defendant argues that the prosecutor's use of defendant's invocation of his constitutional right to refuse to consent to a warrantless search and the fact that he contacted his attorney as evidence of his guilt deprived him of due process and requires a new trial. The state responds (1) that defendant waived any arguments regarding his refusal to allow the police to search his car; (2) that any error was invited because defendant testified on direct examination about his refusal to consent to a search and his attempts to contact his attorney; (3) that no constitutional error occurred because defendant's right to counsel did not attach until the state initiated formal criminal proceedings; and (4) that any error was harmless beyond

a reasonable doubt, in any event. We address each of these contentions in turn.

A. Waiver

We first reject the state's argument that defendant waived his objection to evidence that the refused to consent to the warrantless search by not objecting when the first officer testified. Defendant had already moved for, and been granted, an order precluding admission of this testimony. A motion *in limine* preserves for appeal any objection therein. *See State v. Burton*, 144 Ariz. 248, 250, 697 P.2d 331, 333 (1985); *State v. Lujan*, 136 Ariz. 326, 328, 666 P.2d 71, 73 (1983). Furthermore, defendant made several objections throughout the trial to admission of this evidence. He also moved for mistrial on this basis.[5] Additionally, the issue

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5. After the trial court denied his motion for a mistrial, defense counsel made a further comment to clarify his objection on the record:

> [DEFENSE COUNSEL:] Judge, just so the record is clear, the kind of questions and the point in time we're talking about were not having to do with an afternoon phone call that was being testified to. *It had to do with the time the police arrived and were questioning my client and his assertion of his rights*. That's the time I was talking about.
>
> THE COURT: I'm not sure that was the time that [the prosecutor] was talking about.
>
> [DEFENSE COUNSEL:] It did not appear to be. We approached the bench at that time. That's when you cautioned
>
> (continued...)

was raised in defendant's motion for a new trial. Under these circumstances, we find no waiver on this record.

B. Invited Error

The state also argues that the testimony defense counsel elicited from defendant on direct examination about his contact with his attorney "invited" the error he now alleges as a result of the state's cross-examination on this subject. In overruling defendant's objection to this evidence, the trial court concluded that the subject that defendant "consulted with counsel, and when and with whom, has become relevant because the defense has made it so."

We have previously held that the doctrine of invited error applies to a prosecutor's comments on a defendant's invocation of the fifth amendment right to remain silent as well as a defendant's invocation of his fourth amendment protections. *State v. Wilson*, 185 Ariz. 254, 258, 914 P.2d 1346, 1350 (App. 1995); *see also State v. Crumley*, 128 Ariz. 302, 305, 625 P.2d 891, 894 (1981). We conclude that it is appropriate for

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5. (...continued)
her. We then went into this new topic about what happened when the police arrived, and that's when I came up to the bench and moved for a mistrial.

(Emphasis added.) The court did not reconsider its denial of defendant's motion for a mistrial.

us to review the invited error exception to the admission of otherwise inadmissible evidence in this case.

Invited error occurs when "evidence adduced or comments made by one party make otherwise irrelevant evidence or require some response or rebuttal." *Wilson*, 185 at 258, 914 P.2d at 1350, citing *State v. Woods*, 141 Ariz. 446, 455, 687 P.2d 1201, 1210 (1984). The state argues that its elicitation of defendant's testimony about his contact with his attorney was justified by defendant's own testimony about that subject during his direct examination. However, the state fails to recognize that defense counsel's purpose in eliciting that testimony on direct examination was to explain defendant's refusal to consent to a search of his car, which the prosecution had elicited from the two police officers in its case-in-chief, in violation of the *in limine* order precluding such testimony. Under similar circumstances, involving testimony about a defendant's assertion of his right to remain silent, we have concluded that invited error did not occur:

> This is a novel proposition -- that the State, having deliberately created constitutional error during its case-in-chief, somehow renders that error harmless by cross-examining the defendant on the same subject. Although we can see from the record that the prosecutor's cross-examination of Appellant was in response to questions his counsel asked the backup officer regarding the meaning of the *Miranda* warnings, *the fact that Appellant's counsel asked some questions about this subject does not excuse the previous deliberate error by the prosecution*. We do not agree that the State can create deliberate constitutional error, then save the conviction by arguing that the error became

> harmless when Appellant's counsel asked a few questions to try to minimize the damage.

State v. Keeley, 178 Ariz. 233, 236, 871 P.2d 1169, 1172 (App. 1994) (emphasis added). Likewise, in this case, defendant's testimony on direct examination did not "invite" error; it merely responded to it. His testimony about his attempts to contact his attorney was necessary to explain the state's prior evidence elicited, in violation of the *in limine* orders, of his refusal to consent to a search. Under these circumstances, we conclude that no invited error occurred that would justify the prosecutor's conduct in this case.

C. Constitutional Error

As a preliminary matter, we address the state's contention that defendant had no sixth amendment right to counsel to assert during the preliminary police investigations. We agree. *See United States v. Gouveia*, 467 U.S. 180, 189 (1984) (sixth amendment right to counsel does not attach until the government initiates adversarial judicial criminal proceedings). However, defendant is not alleging a violation of his sixth amendment right to counsel in this case, nor is he alleging that his fourth amendment rights were violated by an unlawful search or seizure. Defendant's argument is that his rights to due process under the fifth and fourteenth amendments were violated by the witness testimony and

prosecutorial comments concerning his contact with his attorney and his assertion of his fourth amendment rights in refusing to consent to a warrantless search.

The United States Supreme Court has found that due process is violated when a defendant's assertion of his right to remain silent is introduced at trial as evidence of his guilt, because the exercise of a constitutional right is "insolubly ambiguous." *Doyle v. Ohio*, 426 U.S. 610, 617 (1976). Although the Supreme Court has not addressed whether due process is violated by admission of evidence of either a defendant's invocation of his fourth amendment right to refuse to a warrantless search or his decision to meet with counsel before his arrest, many other jurisdictions have addressed those issues, and have found a due process violation occurs under circumstances similar to those in this case. *E.g.*, *United States v. Thame*, 846 F.2d 200, 206 (3d Cir.) (error for the prosecutor to argue that defendant's refusal to consent to search of his bag constituted evidence of his guilt), *cert. denied*, 488 U.S. 928 (1988); *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) ("passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of wrongdoing"); *United States v. Taxe*, 540 F.2d 961 (9th Cir. 1976) (prosecutor's comments on defendant's

refusal to consent to a search of their trucks was "misconduct" but harmless under circumstances); *United States v. Rapanos*, 895 F. Supp. 165, 168 (E.D. Mich. 1995) (error to insinuate that defendant's refusal to consent to warrantless entry onto his land was evidence of concealment of a crime); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979) (right to refuse to consent to warrantless search of car "would be effectively destroyed if, when exercised, it could be used as evidence of guilt"); *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) (prosecutor "may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt"); *United States v. McDonald*, 620 F.2d 559, 563-64 (5th Cir. 1980) (constitutional error "to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel"); *United States v. Yeager*, 476 F.2d 613, 616 (3d Cir. 1973) (prosecutor's comment that defendant called his attorney the morning after the incident constitutional error).

One of the most analogous situations to the circumstances of this case was recently before the federal district court in *United States v. Rapanos*, 895 F. Supp. 165 (E.D. Mich, 1995). In that case, the defendant was charged with knowing discharge of pollutants into federal wetlands. On

cross-examination at trial, the prosecutor asked the defendant about his refusal to allow warrantless entry onto his land by state environmental officers:

Q: . . . [A]gain, you had not let the DNR on the property?

A: [My attorney] told them just point blank, you will not be allowed on the property?

Q: And you agreed with that?

A: He said you cannot go on the property without a search warrant, I think.

. . . .

Q: Since you were certain in your own mind that there were no wetlands there, *why not let the DNR on the property?*

A: It's not my decision.

Q: *Were you practicing concealment again?*

A: *They could get a search warrant*, . . . and they could go out there the next day if they wanted to. . . They know the procedure. . . .

Q: *So you were practicing concealment, or not?*

Q: *So you weren't willing to say, don't worry, I have nothing to hide, let them on?*

A: I don't think that ever came up.

Q: All right. And as a client, you have the ability to do that; right? To say to your attorney, look, go ahead, let them on?

A: I learned a long time ago, that if you don't take your attorney's advice, you shouldn't have him . . . .

Q: So the bottom line is, though, you knew that you could talk to him about that and try to convince him to do that and you chose not to?

A: It didn't happen.

Id. at 167. In reversing this case for a new trial after finding "plain error," the *Rapanos* court noted the following "troublesome" factors: first, the prosecutor's questions were not only elicited during defendant's own testimony, but insinuated an argument that defendant's refusal to consent to a warrantless entry onto his property constituted concealment of incriminating evidence. The fact that defendant was asked why he hadn't convinced his attorney to waive his fourth amendment rights was analogous to the reversible error in *Doyle v. Ohio*, where the prosecutor asked the defendant to explain his silence at the time of his arrest. *Id.* at 168. The court also found that the jury may have been overly influenced by this inference of guilt in Rapanos' case because the evidence of defendant's guilt was not overwhelming and "a reasonable jury could have rendered either verdict. . . . In such a situation, an unchecked prejudicial comment may have indeed tipped the scales in favor of conviction." *Id.* at 169. Thus, the error required reversal and a new trial. *Id.* at 170.

Additionally, this court has previously addressed the issue in *dictum*. *Wilson*, 185 Ariz. at 258, 914 P.2d 1350.[6] We now address the question directly on the merits.

We can see no valid distinction between the privilege against self-incrimination and the right to be free from warrantless searches, when invoked, that would justify a different rule about inadmissibility as evidence of guilt. In *Prescott*, the ninth circuit found the assertion of these rights indistinguishable:

> Because the right to refuse entry when the officer does not have a warrant is equally available to the innocent and the guilty, just as is the right to remain silent, the refusal is as "ambiguous" as the silence was held to be in United States v. Hale [422 U.S. 171, 176–77 (1995)]. . . . Yet use by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective: to induce the jury to infer guilt. In the case of silence, the prosecutor can argue that if the defendant had nothing to hide, he would not keep silent. In the case of the refusal of entry, the prosecutor can argue that, if the defendant were not trying to hide something or someone . . ., she would

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6. The conviction in *Wilson* was otherwise reversed on the basis of an improper jury instruction. Nevertheless, we addressed the remaining issues so they would not arise at retrial, and stated:

> Just as it is generally impermissible for a prosecutor to comment on a defendant's invocation of his Fifth Amendment right to silence, *State v. Still*, 119 Ariz. 549, 551, 582 P.2d 639, 641 (1978), so it is generally impermissible to use a defendant's invocation of his Fourth Amendment protections against him, *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978).

Wilson, 185 Ariz. at 258, 914 P.2d at 1350.

> have let the officer in. In either case, whether the argument is made or not, the desired inference may be well drawn by the jury. This is why the evidence is inadmissible in the case of silence. . . . It is also why the evidence is inadmissible in the case of a refusal to let the officer search.

581 F.2d at 1351–52 (citations omitted). In either situation, we believe that a defendant's invocation of constitutional rights is probative of nothing except the defendant's awareness of his or her constitutional rights.

Similarly, any inference that a suspect's pre-arrest decision to contact an attorney is evidence of guilt is also unwarranted:

> . . . A prosecutor may not, imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt. Neither may she suggest to the jury that a defendant hires an attorney in order to generate an alibi, "take[] care of everything" or "get [his] story straight." Such statements strike at the core of the right to counsel, and must not be permitted.

Sizemore v. Fletcher, 921 F.2d at 671; *see also Yeager*, 476 F.2d at 616–17 (prosecutor's comment about defendant's consultation with counsel one day after incident "would appear to be directed to, and may have had the effect of, raising in the juror's minds the inference that [defendant] was, or at least believed himself to be, guilty").

We conclude that the prosecution's references to defendant's invocation of his fourth amendment rights to refuse to consent to a warrantless entry and to his contact with an attorney prior to his arrest violated defendant's due process rights to a fair trial. The state's purpose

in eliciting this evidence clearly was "to induce the jury to infer guilt" from defendant's actions. *Prescott*, 581 F.2d at 1352. This purpose is plainly apparent from the egregious comments in the state's closing arguments. Regarding defendant's refusal to consent to the search, the state impermissibly argued:

> Good people help the police in pursuing an investigation of this type. They don't frustrate the police by requiring them to get a search warrant to find evidence of a crime.

Regarding defendant's contact with his attorney, the state impermissibly argued:

> [Defendant] called his lawyer. And you know why, because he knew he was the one who hit that boy. He knew he was involved in the death of [the victim]. He knew that there wasn't any dark car. He was concerned, at that point, about one thing, protecting himself. He was concerned about not being arrested by the police. And that's why he called his lawyer.

We conclude that these comments were highly improper in at least two respects. First, they directly violated the *in limine* order.[7] Second, they violated defendant's due process rights to a fair trial by creating an

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7. We overturn convictions for prejudicial error, not to punish prosecutors for improper comments. *United States v. Mazzone*, 782 F.2d 757, 763 (7th Cir.), *cert. denied*, 479 U.S. 838 (1986). As noted by the *Mazzone* court, "It is better to punish the prosecutor directly; there is no lack of direct sanctions for lawyer's misconduct, of which improper advocacy is a well-recognized species." *Id.*, citing *United States v. Young*, 105 U.S. 1038, 1043–44 (1985).

inference that defendant's invocation of constitutional rights was evidence of his guilt.

D. Harmless Error

Having found a constitutional due process violation, we next turn to the question whether the error was of sufficient prejudice to require a new trial. Error is "harmless" when it can be said beyond a reasonable doubt that it did not contribute to or affect the verdict. *State v. Krone*, 182 Ariz. 319, 321, 897 P.2d 621, 623 (1995).

Some courts have held that, when the prosecutor's reference to a defendant's invocation of his constitutional rights does not "strike at the jugular" of defendant's version of the events, the error is harmless. *See Stone v. Estelle*, 556 F.2d 1242, 1245 (5th Cir. 1977) ("the relevant distinction to be made . . . is between a case involving an attack on a defendant's exculpatory story and an attack on his behavior subsequent to the alleged crime for which he is being tried"), *cert. denied*, 434 U.S. 1019 (1978). In *Stone*, for example, the court found harmless the prosecutor's comment on defendant's request to contact an attorney because it did not address the core of his defense, that the victim had been accidently, not deliberately, shot. *Id.* at 1245–46.

The central issue at trial in this case was defendant's state of mind at the time of the offenses. Defendant did not contest that his car hit the victim. However, as to the manslaughter charge, he contended he did not act "recklessly" in driving the car. *See* A.R.S. § 13-1103(A)(1). As to the charge of leaving the scene of a fatal injury accident, he contended he did not have the requisite "knowing" mental state that an accident had occurred. *See* A.R.S. § 28-661. On appeal, the state argues that, even if error, the prosecutorial comments at trial were harmless because they were not relevant to any "essential element" of these offenses, but rather were evidence only of defendant's state of mind after the offenses had already occurred. However, the context in which defendant's invocation of his fourth amendment rights and conversations with his attorney were argued in closing arguments indicates the state's intent to use this evidence to rebut defendant's defense that he did not drive recklessly and that he did not know he was involved in an accident the night of the incident. Therefore, we do not apply the *Stone* reasoning in this case to find the error harmless.

Another approach to the question of harmless error under similar circumstances is to examine a number of factors to determine whether defendant was prejudiced. First, was defendant forced to defend his invocation of constitutional rights through his own testimony? If the error occurred solely in closing comments, which the jury is advised are not

evidence, the prejudice might be less. *See Rapanos*, 895 F. Supp. at 168. Second, were the comments "moderate in tone and import," and lacking significance when considered with the overall evidence? *See People v. Redmond*, 633 P.2d 976, 979 (Cal. 1981). Third, to what degree did the remarks complained of "have a tendency to mislead the jury and to prejudice the accused?" *Sizemore v. Fletcher*, 921 F.2d at 671. Fourth, were the comments "deliberately or accidently placed before the jury?" *Id.*; *see also Keeley*, 178 Ariz. at 236, 871 P.2d at 1172 (to find a deliberate error harmless "would just encourage similar constitutional error in the future"); *State v. Sorrell*, 132 Ariz. 328, 330, 645 P.2d 1242, 1244 (1982) (appellate courts are reluctant to find error harmless "when it appears that the error was deliberate and willful"). Fifth, what was the strength of the proof introduced to establish defendant's guilt; was it otherwise overwhelming or was it disputed circumstantial evidence that made defendant's credibility a factor? *See Yeager*, 476 F.2d at 616–17.

Applying these factors to this case, we cannot conclude the error was harmless beyond a reasonable doubt. First, this case did not involve just a single innocuous reference by a witness to defendant's assertion of constitutional rights; rather, the subject was elicited many times through three witnesses, including defendant's own testimony. Second, the

inference of guilt from this evidence was strongly argued in the prosecutor's closing comments, despite numerous prior defense objections to this evidence, and despite a pretrial *in limine* order, and could hardly be considered "moderate in tone and import." Third, the argument that defendant was guilty because he did not consent to a warrantless search or because he consulted an attorney certainly could mislead the jury and prejudice defendant's defense. Fourth, we can find no "accidental" placing of these facts before the jury under the facts of this case. This was a deliberate attempt by the prosecution to establish guilt at the time of the offense from defendant's constitutionally-permissible conduct after the incident. Fifth, we do not find the evidence otherwise so overwhelming in this case that we could say beyond a reasonable doubt that the error did not affect the verdict. Defendant's credibility about his state of mind on the night of the accident was a central issue to his defense. A great deal of the evidence in this case was circumstantial and conflicting. There was disputed testimony regarding the lighting, visibility, road conditions, and state of the construction site at which the incident occurred. The extent of defendant's alcohol consumption and impairment was disputed. Our review of the evidence cannot compel us to reach the conclusion that the constitutional error that occurred in this case was harmless beyond a

reasonable doubt. Accordingly, we must reverse the convictions and remand this matter for a new trial.

CONCLUSION

We conclude that the prosecutor's use of this evidence violated defendant's due process rights to a fair trial, and the error was not harmless beyond a reasonable doubt. The convictions and sentences are therefore reversed and this matter is remanded for a new trial.

/s/
EDWARD C. VOSS, Judge

CONCURRING:

/s/
JAMES B. SULT,
Presiding Judge, Department D

/s/
SUSAN A. EHRLICH, Judge

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,	)	SUPREME COURT
	)	No. CR-97-0039-PR
Appellee,	)	
	)	Court of Appeals
vs.	)	No. 1 CA-CR 95-00752
	)	
EDWARD PALENKAS	)	Maricopa County
	)	No. CR 94-91187
Appellant.	)	
	)	ORDER

March 27, 1997

The following action was taken by the Supreme Court of the State of Arizona on March 25, 1997, in regard to the above-referenced cause:

ORDERED: Petition for Review [Appellant's Palenkas] DENIED.

FURTHER ORDERED: The State of Arizona's Petition for Review DENIED.

FURTHER ORDERED: Vice Chief Justice Jones voted to grant the State's Petition for Review as to Issues 1 and 2.

Record returned to Court of Appeals, Division One, Phoenix, this 27th day of March, 1997.

NOEL K. DESSAINT, Clerk

To: Hon. Grant Woods, Arizona Attorney General
Attn: Paul J. McMurdie, Esq., and Mona S. Peugh-Baskin, Esq.
Tracey Westerhausen, Esq., Debus & Kazan Ltd.
Marc Budoff, Esq., Budoff & Ross
Edward Palenkas, DOC 116363, Arizona State Prison, Tucson.
Glen Clark, Clerk, Court of Appeals, Division One
West Publishing/Lexis-Nexis

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	1 CA CR 95-0752
Appellee,	)	
	)	Department D
vs.	)	
	)	
EDWARD PALENKAS	)	
	)	
Appellant.	)	
	)	

ORDER AND MANDATE
Filed April 15, 1997

Grant Woods, The Attorney General
by: Paul J. McMurdie, Chief Counsel
Criminal Appeals Section
and
Mona Peugh-Baskin
Assistant Attorney General

Attorneys for Appellee Phoenix

Debus & Kazan, Ltd.
by: Tracey Westerhausen

and
Budoff & Ross
by: Marc Budoff

Attorneys for Appellant Phoenix

The opinion of this Court in the above matter was filed on November 5, 1996.

The motion for reconsideration was denied and notice thereof was given on December 19, 1996. A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated *March 25, 1997, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR 97-0039-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on April 15, 1997. A copy of the ORDER and MANDATE and a copy of the opinion were mailed to the Honorable Christopher M. Skelly, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk by the Court in aid of the consideration of this matter.

DATED April 15, 1997.

/s/
VICE CHIEF JUDGE

All of the foregoing directives were complied with April 15, 1997.

GLEN D. CLARK, Clerk
By

/s/
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 2 1997
CLERK

No. 96-1734

In The

Supreme Court of the United States

October Term, 1996

STATE OF ARIZONA,

Petitioner,

v.

EDWARD PALENKAS,

Respondent.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Police, investigating a fatal hit and run accident, suspected that Palenkas' car was involved. Prior to trial, Palenkas filed a motion in limine, asking the court to preclude evidence that he would not agree to a warrantless search by police without first speaking with his attorney. He argued constitutional grounds, lack of relevance, and unfair prejudice. The state conceded the motion, and the trial court granted it. The state then introduced at trial evidence pertaining to the precluded topics, and urged that the evidence showed Palenkas' guilt in closing argument.

1. Did the Arizona court of appeals correctly grant Palenkas a new trial for the prosecution's insinuation of guilt from his request to speak with counsel and invocation of his right to refuse a warrantless search?

2. Did the court of appeals correctly hold the prosecution to its stipulation and trial court order, under state law, in granting Palenkas a new trial?

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STATEMENT OF THE CASE[1]

A. FACTS

On April 12, 1994, Palenkas and his friend Robert Davis ate dinner at a restaurant in Scottsdale, Arizona. They each sipped two alcoholic drinks along with their meals. The bartender observed nothing unusual about Palenkas' demeanor. T 6/21/95 79-82[2] As Palenkas left the restaurant, he slipped in an area where both employees and customers had tripped before. *Id.* The bartender, concerned about Ed's condition, spoke with him and offered to give Palenkas a ride home, which Palenkas declined. After assuring himself that Palenkas was fine, the bartender watched Palenkas leave the restaurant, going across an uneven patio and up a set of stairs; Palenkas was normal after the slip. *Id.* 83-89. Two other restaurant employees also saw the slip.

At about the time Palenkas and Davis traveled toward home, David "Ted" Turner and his 11 year old son, Kipp, were walking home from a video store. Their path along the shoulder of the road (there was no sidewalk) was blocked, by a trench extending away into the desert and by two large dirt piles. The piles, which were in place for only 24 hours from a gas company project, and the trench behind them forced the Turners to walk onto the asphalt of the roadway itself. After passing the piles, Ted returned to the shoulder of the road. Kipp, behind him, continued on the asphalt about 12" from the

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[1] All parties appear in the caption on the cover page.

[2] "T" refers to a transcript from the trial court proceedings; "item," referred to *infra*, specifies a document from the record on appeal.

pavement edge. TT 6/20/95 51, 6/26/95 298-300, 6/28/95 14, 33. (Contrary to the implication in the state's petition at 4, it was uncontested that Kipp was walking on the pavement at the time of the accident.)

Turner saw a car approaching, one which he claimed was driving erratically. The car struck Kipp on the roadway and proceeded ahead without braking or stopping, giving no sign that the driver was aware that anything had happened. Turner described the car that struck Kipp as a dark, American 4-door sedan.

Due to Kipp's position, the instantaneousness of the event and other factors, the accident was a terrible mischance. The state's accident reconstructionist explained that the whole event, from Kipp striking the car to landing, took only 1.27 seconds. Kipp's body struck the extreme right front corner of the car, at the blinker-headlight assembly on the front and on the top near the right edge of the vehicle. The span of time between the initial impact and Kipp's head hitting the top right side of the car was half an eye-blink. Taking into account perception-reaction time, the reconstructionist established that Palenkas might have seen the boy only if he had been looking in the right corner of the windshield and through the right passenger window. An eminent lighting expert for the defense explained that because of the lighting conditions extant at the time of the accident, Palenkas could not have seen the boy at all.

Palenkas heard the report of the accident on the news. He called Davis on the morning of April 13th. He wondered, "We came through there approximately the same time (as the accident), and it might have been me,"

or "it could have been me that hit the boy." T 6/20/95 146. Davis specifically denied that he understood the statement to be an admission to the crime, contrary to the statement in the petition at 5.

Debris left from the vehicle was evaluated by the police. It belonged to a white 1984 or newer Rolls Royce or Bentley. Detectives from the Scottsdale Police Department obtained a list of owners, and began going door to door on April 13th. The fourth house was the Palenkas home; he invited the detectives in. They told him what they were there for, asked to see his car, and asked what color his car was. Palenkas told them the car was white, but declined to let them see it without first speaking with his attorney, whom he was waiting to hear from.

Eventually, Palenkas was indicted for one count of reckless manslaughter and one count of leaving the scene of a fatal accident.

B. PROCEDURAL HISTORY

The state's petition omits a critical aspect of the trial court procedural history, in violation of Rule 14 (1)(g)(i). Prior to trial, Palenkas filed a motion to preclude admission of evidence pertaining to two, interrelated topics: his invocation of his right to refuse to submit to a warrantless search, and his request to speak with counsel. Item on Record on Appeal 56; petition appendix A7-8. The motion sought preclusion of this evidence on constitutional and relevance grounds, and because any probative value was outweighed by unfair prejudice. The state conceded the motion in writing. Item 70. At oral argument, the

prosecutor said, "Obviously, we've conceded those issues." T 3/10/95 5. The judge granted the motions. *Id.*

Despite its concession, the state introduced evidence of Palenkas' request to speak with counsel and his right to refuse a warrantless search into evidence, through the testimony of the detectives in the case-in-chief. As described in the opinion of the Arizona court of appeals, the prosecutor then argued at length and vigorously that these two interrelated statements were evidence of guilt.

The state also omits relevant appellate court procedural history. In its brief before the court of appeals, the state contended one thing regarding Palenkas' desire to speak with counsel: that the right to counsel under the 6th Amendment had not attached, so there was no constitutional violation entitling him to a new trial. The prosecution did not address the relevance-probative value arguments (which the state had previously conceded) raised by the defense in its briefs. Nor did the state address Palenkas' relevance-probative value arguments regarding the search issue on appeal.

The court of appeals concluded that the admission of the evidence, combined with the argument, entitled Palenkas to a new trial. The court did so because the prosecution's conduct violated the trial judge's order (to which the state stipulated), and for violation of due process. Petition appendix A27-28. The appellate court characterized the prosecution's conduct as "egregious" and "highly improper." *Id.* A27. The court also found – in light of Palenkas' state of mind as central to his defense, and the circumstantial and conflicting evidence – that the error was not harmless.

REASONS WHY THE PETITION SHOULD BE DENIED

There are four reasons for denying the writ: (a) a unanimity of authority and the correctness of that prevailing view; (b) the inability, on the facts presented, to disentangle the constitutional questions posed by the state from non-constitutional issues of state law, (c) the court of appeals, in ordering a new trial for violation of the order pertaining to the motion in limine, relied upon an adequate and independent state ground, and, (d) the state's confessed reversible error, under state law, by failing to address the relevance-probative value arguments in the courts below.

A. THE UNIFORM RULE – CONDEMNING USE OF ONE'S REQUEST TO SPEAK WITH COUNSEL AND OF ONE'S RIGHT TO REFUSE A WARRANTLESS SEARCH AS EVIDENCE OF GUILT – IS CORRECT

As the state concedes, no split of authority exists on the distasteful tactic of using, as evidence of guilt, a defendant's request to speak with counsel or his invocation of the right to refuse a warrantless search. The federal courts of appeal and the state appellant courts universally condemn the practice, although sometimes declining to reverse under a harmless error analysis. *See* petition at 9-10; petition appendix at A21-22 (collecting cases).

These courts reach the result for two reasons. First, they logically employ the teaching of *Doyle v. Ohio*, 427 U.S. 610 (1976) to the search and counsel issues. Second, they correctly apply *United States v. Hale*, 422 U.S. 71 (1975). *Hale* held that the probative value of pre-trial

silence was outweighed by its unfair prejudice. It therefore granted a new trial on evidentiary – rather than constitutional – grounds. *Id.* at 73. "If the Government fails to establish a threshold inconsistency between silence at the police station and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." *Id.* at 75; *see also State v. Scott*, 27 Ariz. App. 361, 362, 555 P.2d 118 (App. 1976) ("Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice"); *Silvernail v. State*, 777 P.2d 1169, 1174 (Alaska Ct. App. 1989) ("We conclude that the trial court's failure to balance probative value [of pre-arrest silence] against prejudicial impact amounted to plain error").

The lack of probative value and danger of unfair prejudice are as important considerations for the desire to speak with counsel as they are for pre-trial silence. *Arthur v. State*, 575 S.2d 1165, 1179 (Ala. Crim. App. 1990), *cert. denied*, 575 S.2d 1191 (Ala 1991) ("Even assuming that our cited authorities do erroneously rest their holdings on the Sixth Amendment, we still find them to be authoritative. They illustrate the intense distaste that courts have for . . . testimony and comments [that representation by an attorney creates an inference of guilt]"); *Commonwealth v. Person*, 400 Mass. 136, 141, 508 N.E.2d 88 (1987); *quoting Zemina v. Solem*, 438 F.Supp. 455, 466 (D.S.D. 1977), *aff'd*, 573 F.2d 1027 (8th Cir. 1978) ("A defendant's decision to consult an attorney is not probative in the least of guilt or innocence, and a prosecutor may not 'imply that only guilty people contact their attorneys' ").

They pertain equally to the right to refuse a warrantless search. *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) ("Because the right to refuse entry when the officer does not have a warrant is equally available to the innocent and the guilty, just as is the right to remain silent, the refusal is as 'ambiguous' as the silence was held to be in [*Hale*]"); *State v. Wilson*, 185 Ariz. 254, 258, 914 P.2d 1346 (App. 1996) (just as it is generally impermissible for a prosecutor to comment on a defendant's right to silence, "so it is generally impermissible to use a defendant's invocation of Fourth Amendment protections against him").

The cases, cited in the opinion of the court of appeals and above, show that the state and federal courts are not mis-applying the law. As there is no mistake in applying the law, there is no reason justifying review by this Court.

B. THE FEDERAL CONSTITUTIONAL ISSUE AND THE STATE EVIDENTIARY ISSUE ARE INEXTRICABLY TANGLED

The counsel issue and the search issue are factually indivisible because the latter flowed directly from the former. (Thus, it is irrelevant that the counsel issue does not arise under the 6th amendment.) The issues are also legally linked, presenting closely related constitutional and evidentiary concepts.

> The underlying rationale of the constitutional bar against admitting evidence of a defendant's post-arrest silence is the concern that such evidence is only minimally probative, while possessing a high potential for prejudice to the defendant's case. . . . Thus, Silvernail's fifth

> amendment objection not only flagged the need for caution in admitting the disputed line of inquiry, but also invoked the underlying policies that are involved in the evidentiary claim that he now asserts on appeal.

Silvernail, 777 P.2d at 1174. While Arizona has not specifically adopted an evidentiary rule precluding admission of a defendant's request to speak with counsel, it has adopted the *Hale* analysis for fifth amendment claims. *State v. Scott*. It has also approved, in *dictum*, the same rule regarding the search issue. *State v. Wilson*. Thus, there exists an adequate non-federal ground for the result achieved by the Arizona court of appeals. This is yet another basis for denying review. R. Stern, et al., *Supreme Court Practice* § 4.25 at 207-208 (7th Ed. 1993).

C. THE COURT OF APPEALS ALSO RESTED ITS CONCLUSION ON AN ADEQUATE AND INDEPENDENT STATE GROUND

A third reason to deny review is that there is an adequate, independent state ground upon which the opinion of the court of appeals rests. The defense moved in limine to preclude evidence of the search and counsel issues. The state stipulated to the motion, and the trial court granted it. In summarizing the law on these issues and the facts of this case, the court of appeals held:

> We conclude that these comments were highly improper in at least two respects. **First, they directly violated the *in limine* order.** Second, they violated defendant's due process rights to a

> fair trial by creating an inference that defendant's invocation of constitutional rights was evidence of his guilt.

State v. Palenkas, 229 Ariz. Adv. Rep. 18, 24 (App., 11/05/96), petition appendix at A27-28 (emphasis added). This holding, dependent as it is upon the state law of stipulation, motion practice and trial practice, is an adequate and independent state ground for affirming the action by the court of appeals. It is one more reason for denying review. *Supreme Court Practice* § 3.24 at 152-158.

D. UNDER ARIZONA LAW, THE STATE HAS CONFESSED TO REVERSIBLE ERROR

Palenkas moved in limine to preclude evidence pertaining to the search and counsel issues. The reasons included lack of relevance and unfair prejudice under Rules 401 and 403, Ariz. R. Evid. The state stipulated to the motion.

On appeal, Palenkas argued that these were grounds, in addition to the constitutional arguments, to grant a new trial. The state did not respond to the evidentiary arguments for either issue. When an appellant raises debatable issues, the appellee's failure to respond to them generally constitutes a confession of reversible error. *Hecla Mining Co. v. Industrial Com'n.*, 119 Ariz. 313, 314, 580 P.2d 774 (App. 1978). For this additional state ground, review by this Court should be declined.

CONCLUSION

The prosecution in this case stipulated that it would not use Palenkas' request to speak with counsel and his right to refuse a warrantless search as evidence of guilt. It then did so, in violation of the stipulation and the trial court order. The court of appeals determined that a new trial was necessary to remedy such "egregious" and "highly improper" conduct. That decision was the logical and just result.

Respectfully Submitted by

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